

2015 WL 5897940 (Minn.Dist.Ct.) (Trial Pleading)  
District Court of Minnesota,  
First Judicial District.  
Scott County

Lawrence J. GERGEN, as special administrator of the Estate of J. Clarice Gergen, aka Jeanette Clarice Gergen, Lawrence J. Gergen, Thomas V. Gergen, Patricia J. Ingvalson, and Margaret M. Swenson, Plaintiffs,  
v.

Eugene R. GERGEN, Daniel J. Gergen and Dominic D. Gergen, as trustees for the  
D6 Co Irrevocable Trust Under Agreement Dated September 20, 2013, and D6  
Co Irrevocable Trust Under Agreement Dated September 20, 2013, Defendants.

No. 70-CV-14-14385.  
February 19, 2015.

**Second Amended Complaint**

Huemoeller & Gontarek PLC, [Anton Cheskis](#), #0390001, 16670 Franklin Trail, Prior Lake, MN 55372, Telephone (952) 447-2131, Facsimile (952) 447-5628, for plaintiffs.

Case Type: 14. Other Civil

Plaintiffs, for their Complaint against Defendants herein, state and allege as follows:

***THE PARTIES***

1. J. Clarice Gergen, aka Jeanette Clarice Gergen ("JCG") died testate on June 6, 2014 in Scott County, Minnesota due to a lengthy battle with various health complications.
2. Lawrence J. Gergen was appointed the special administrator for the Estate of J. Clarice Gergen ("JCG Estate") to preserve the JCG Estate and to secure its proper administration until a general Personal Representative is appointed, by court order dated August 18, 2014 in court file number 70-PR-14-14789
3. Plaintiffs Lawrence J. Gergen, Thomas V. Gergen, Patricia A. Ingvalson, and Margaret M. Swenson ("Plaintiffs") are siblings, biological children of JCG, and heirs of the JCG Estate.
4. Defendant Eugene R. Gergen ("Defendant Gergen") is an individual residing at 11314 County Road 31 SE, Osakis, Minnesota, 56360. Defendant is a sibling of Plaintiffs, a biological child of JCG, and an heir to the JCG Estate.
5. JCG appointed Defendant Gergen to act as her living attorney-in-fact on October 11, 2006. Defendant Gergen acted as JCG's sole attorney in fact until her death.
6. Defendant D6 Co Irrevocable Trust Under Agreement Dated September 20, 2013 ("D6 Co Trust") is an irrevocable trust established by Defendant Eugene R. Gergen on September 20, 2013 in Douglas County, Minnesota; trust agreement of which is attached hereto as Exhibit A.

### ***JURISDICTION AND VENUE***

7. The court has jurisdiction of Plaintiffs' claims under [Minnesota Statute, Section 484.01](#).
8. The acts giving rise to Plaintiffs' claims in this case arose in Scott County and the damages occurred in Scott County.
9. This case is properly venued in Scott County, Minnesota under [Minnesota Statute, Section 542.09](#).

### ***FACTUAL ALLEGATIONS***

10. Plaintiffs Lawrence J. Gergen, Thomas V. Gergen, Patricia J. Ingvalson, Margaret M. Swenson, and Defendant Eugene R. Gergen are all biological siblings and children of their father, Isadore Gergen, and mother, JCG. Isadore Gergen died testate October 17, 2004. Two trust funds remained for the benefit of JCG and her children ("Isadore Trusts"). Security Bank & Trust Co. ("Security Bank") was subsequently appointed as the sole successor trustee to the Isadore Trusts.
11. Defendant Gergen's share of the Isadore Trusts is comprised largely of two promissory notes signed in June, 2005. With interest, these promissory notes currently total \$289,710.42.
12. JCG began to suffer declining health in 2006. Due to her fading health, on October 11, 2006, JCG appointed Defendant Gergen to act as her attorney-in-fact through a Minnesota Statutory Short Form Power of Attorney, as defined in [Minnesota Statute, Section 523.23](#) ("POA"). The POA authorized Defendant Gergen to transfer JCG's property to himself, within the limitations expressed in Minnesota Statute, Section 523.24.
13. On August 16, 2005, J. Clarice Gergen purchased an annuity with Jackson National Life ("Jackson National Annuity"). As of August 21, 2013, the Jackson National Annuity was valued at \$362,181.64. The Jackson National Annuity represented a large majority of JCG's assets.
14. On August 21, 2013, Defendant Gergen, acting as JCG's attorney-in-fact, and without JCG's express consent, withdrew the entire \$362,181.64 Jackson National Annuity and deposited the Jackson National Annuity proceeds into a U.S. Bank, N.A. checking account on which JCG was the sole account holder ("JCG Checking Account") via wire transfer.
15. On August 24, 2013, Defendant Gergen wrote a personal check out of the JCG Checking Account for \$350,000.00 made payable to the D6 Co Trust ("Wrongful Gift"). The check was endorsed by Defendant Gergen in his "power of attorney" capacity.
17. The Wrongful Gift from the JCG Checking Account left JCG with minimal liquid assets remaining.
18. On February 20, 2014, the individual Plaintiffs sent a letter to Defendant Gergen asking for an accounting of JCG's income, expenses, and investments since 2006, including but not limited to an explanation of the whereabouts of the \$362,181.64 Jackson National Annuity. Defendant Gergen did not provide an accounting at that time, and verbally told Plaintiffs that JCG "gifted" him the \$350,000.
19. After JCG's death, Plaintiffs requested an accounting from Defendant Gergen on behalf of the JCG Estate. Defendant Gergen responded without providing an accounting and referring to the Wrongful gift as an offset to the approximately \$290,000 Isadore Trusts promissory notes.
20. To date, Defendant Gergen has not provided an accounting of JCG's **financial** affairs since 2006, in violation of [Minnesota Statute, Section 523.21](#), and has not returned the Wrongful Gift to the JCG Estate.

***COUNT I***

**GIFT IN VIOLATION OF MINN. STAT. § 523.24 (Defendant Gergen and Defendant D6 Co Trust)**

21. Plaintiffs reallege the preceding paragraphs of this Complaint.

22. Minn. Stat. § 523.24, Subd. 8(2) (2013) places an annual gift limitation on an attorney-in-fact, providing in pertinent part:

[N]otwithstanding that the principal...may have authorized the attorney-in-fact to transfer the principal's property to the attorney-in-fact, no attorney-in-fact nor anyone the attorney-in-fact has a legal obligation to support may be the recipient of any gifts in any one calendar year which, in the aggregate, exceed the federal annual gift tax exclusion amount in the year of the gift.

23. In 2013, the federal annual gift tax exclusion amount was \$14,000.00.

24. Defendant Gergen's Wrongful Gift to D6 Co Trust exceeded the gift limitation of Minn. Stat. § 523.24 (2013).

25. As a result of Defendant Gergen and Defendant D6 Co Trust's violation of Minn. Stat. § 523.24, Plaintiffs have been damaged in an amount exceeding \$50,000.

***COUNT II***

**CONVERSION**

**(Defendant Gergen and Defendant D6 Co Trust)**

26. Plaintiffs reallege the preceding paragraphs of this Complaint.

27. Plaintiffs, as heirs to the JCG Estate, each own an undivided one-fifth share of the Wrongful Gift by Defendant Gergen to Defendant D6 Co Trust.

28. Defendant Gergen, acting willfully, unlawfully, and without legal authority, took the \$350,000 Wrongful Gift and prevented the \$350,000 Wrongful Gift from transferring to JCG Estate upon JCG's death, converting the same to Defendant Gergen and Defendant D6 Co Trust's enjoyment.

29. As a result of Defendants Gergen and Defendant D6 Co Trust's wrongful conversion, Plaintiffs have been damaged in an amount exceeding \$50,000.

***COUNT III***

**CIVIL THEFT IN VIOLATION OF MINN. STAT. § 604.14**

**(Defendant Gergen and Defendant D6 Co Trust)**

30. Plaintiffs reallege the preceding paragraphs of this Complaint.

31. Plaintiffs, as heirs to the JCG Estate, each own an undivided one-fifth share of the \$350,000 Wrongful Gift by Defendant Gergen to Defendant D6 Co Trust.

32. Defendants Gergen and Defendant D6 Co Trust unlawfully took the \$350,000 Wrongful Gift, intending to deprive Plaintiffs of the use thereof.

33. Defendants Gergen and Defendant D6 Co Trust stole money from Plaintiffs in violation of [Minn. Stat. § 604.14](#).

34. As a result of Defendant Gergen and Defendant D6 Co Trust's theft, Plaintiffs have been damaged in an amount exceeding \$50,000.

35. Plaintiffs are entitled to judgment against Defendant Gergen and Defendant D6 Co Trust ordering Defendants Gergen and Defendant D6 Co Trust to reimburse Plaintiffs for the stolen money, plus interest, costs, disbursements, attorneys' fees, and punitive damages as permitted by [Minn. Stat. § 604.14](#).

#### ***COUNT IV***

#### **UNJUST ENRICHMENT**

#### **(Defendant Gergen and Defendant D6 Co Trust)**

36. Plaintiffs reallege the preceding paragraphs of this Complaint.

37. Defendants Gergen and Defendant D6 Co Trust knowingly, wrongfully and unlawfully acquired and used the \$350,000 Wrongful Gift from JCG.

38. Defendants Gergen and Defendant D6 Co Trust will be unjustly enriched if allowed to keep the benefit of the \$350,000 Wrongful Gift without compensating Plaintiffs.

39. As a result of Defendant Gergen and Defendant D6 Co Trust's unjust enrichment, Plaintiffs have been damaged in an amount exceeding \$50,000.

#### ***COUNT V***

#### **BREACH OF FIDUCIARY DUTY**

#### **(Defendant Gergen)**

40. Plaintiffs reallege the preceding paragraphs of this Complaint.

41. As the attorney-in-fact for JCG, Defendant Gergen owed JCG a fiduciary duty to have the interests of JCG utmost in mind in managing JCG's affairs.

42. Defendant Gergen's self-serving transfer of JCG's \$350,000 in cash assets to Defendant D6 Co Trust, which left JCG with minimal liquid assets, represents a breach of Defendant Gergen's fiduciary duty to JCG.

43. As alleged herein, Defendant Gergen has acted negligently and breached his fiduciary duty to JCG and Plaintiffs in their capacity as heirs of the estate of JCG.

44. Defendant Gergen's negligent conduct has resulted in injury to Plaintiffs because the \$350,000 should have been included in the JCG Estate upon JCG's death.

45. As a result of Defendant Gergen's breach of fiduciary duty, Plaintiffs have been damaged in an amount exceeding \$50,000.

#### ***COUNT VI***

#### **FRAUDULENT TRANSFERS IN VIOLATION OF MINN. STAT. §§ 513.44(a)(1) AND § 513.47**

#### **(Defendant Gergen and Defendant D6 Co Trust)**

46. Plaintiffs reallege the preceding paragraphs of this Complaint.

47. Defendant Gergen's transfer of \$350,000 from the JCG Checking Account to Defendant D6 Co Trust was made with actual intent to hinder, delay or defraud a creditor to which Defendants were or became indebted on or after the date of the transfer.

49. As a result of the fraudulent transfers, Plaintiffs are entitled to damages pursuant to Minn. Stat. §§ 513.44(a)(1) and 513.47: (a) avoiding and preserving the transfers free and clear from any claimed interest of Defendants, (b) directing the transfers to be set aside, (c) recovering such transfers in the amount of \$350,000 or the value thereof from Defendants for the benefit of Plaintiffs and the JCG Estate, and (d) recovering prejudgment and post-judgment interest, attorney's fees and costs from Defendant Gergen and Defendant D6 Co Trust.

#### ***COUNT VII***

#### **FINANCIAL EXPLOITATION OF A VULNERABLE ADULT IN VIOLATION OF MINN. STAT. § 626.5572**

#### **(Defendant Gergen and Defendant D6 Co Trust)**

50. Plaintiffs reallege the preceding paragraphs of this Complaint.

51. JCG was a vulnerable adult under the definition codified in Minn. Stat. § 626.5572, Subd. 21.

52. Defendant Gergen's fraudulent transfers of \$350,000 to Defendant D6 Co Trust constituted financial exploitation of a vulnerable adult as codified in Minn. Stat. § 626.5572, Subd. 9.

53. As a result of Defendant Gergen and Defendant D6 Co Trust's financial exploitation of a vulnerable adult, Plaintiffs have incurred compensatory damages in the amount exceeding \$50,000.

54. Plaintiffs are entitled to recover damages from Defendants Gergen and Defendant D6 Co Trust equal to three times the amount of compensatory damages or \$10,000, whichever is greater, and reasonable attorney's fees and costs, pursuant to Minn. Stat. § 626.557, Subd. 20.

#### ***PRAYER FOR RELIEF***

WHEREFORE, Plaintiffs requests the Court award the following relief:

1. Judgment in favor of Plaintiffs, and against Defendant Gergen, Defendant D6 Co Irrevocable Trust Under Agreement Dated September 20, 2013, and Defendants Daniel J. Gergen and Dominic D. Gergen, as trustees for the D6 Co Irrevocable Trust Under Agreement Dated September 20, 2013, awarding Plaintiffs damages for Defendants' gifts in violation of Minn. Stat. 523.24, conversion, civil theft, unjust enrichment, breach of fiduciary duty, fraudulent transfers, and exploitation of a vulnerable adult,

in an amount exceeding \$50,000, plus interest, costs, disbursements and attorney fees as provided by law, the exact amount to be proven at trial.

2. Awarding Plaintiffs compensatory damages in an amount exceeding \$50,000, and damages equal to three times the amount of compensatory damages or \$10,000, whichever is greater.

3. Awarding Plaintiffs punitive damages pursuant to by [Minn. Stat. § 604.14](#);

4. Awarding Plaintiffs such other and further relief as the Court deems just and equitable.

Dated: 2/12/15

HUEMOELLER & GONTAREK PLC

By <<signature>>

Anton Cheskis, #0390001

16670 Franklin Trail

Prior Lake, MN 55372

Telephone (952) 447-2131

Facsimile (952) 447-5628

Attorneys for Plaintiffs

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